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In the Superior Court

In and for the County of Apache

State of Arizona,	
	Case Number CR2010-047
Plaintiff,	
	Response to Motion to Review
-vs-	**Preliminary Hearing**
Joseph Douglas Roberts,	
Defendant.	

The defendant was denied no substantial procedural rights. The charges in the complaint were legally sufficient. Evidence presented supported the magistrate's finding of probable cause. The magistrate lacked jurisdiction to consider the defendant's motion to dismiss which was, in any event, without merit. The fact that counsel for the defendant filed a bar complaint against the prosecutors in this case is inapposite to the criminal case and did not deprive the magistrate of jurisdiction over the issue of probable cause. The evidentiary hearing set for June 2, 2010 should be vacated and the defendant's motion should be summarily denied.

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Memorandum of Points and Authorities

The Magistrate's Determination of Probable Cause in no way Constituted a Rush to Place this Case before the Superior Court

The defendant claims, *in toto*, that in her rush to get the defendant's case before the Superior Court, the magistrate deprived the defendant of multiple procedural rights and found probable cause where there was none. This claim requires elucidation.

The defendant was arrested on September 25, 2009 and initialed before an initial appearance master on September 26, 2009.[1] At that time, the master scheduled the defendant's preliminary hearing to occur on October 2, 2009. Counsel for defendant repeatedly moved to continue the preliminary hearing.

The first motion to continue, citing counsel's scheduled continuing legal education course also scheduled for October 2, 2009, was filed on September 30, 2009. A supplement to this motion was also filed on September 30, 2009, waiving time pursuant to rule 8.[2] The preliminary hearing was reset for October 9, 2009.

The second motion to continue, which contained no cause for the continuance, was filed on October 6, 2009. The preliminary hearing was reset for November 6, 2009.

On November 5, 2009, the eve of the scheduled preliminary hearing, counsel for defendant filed his third motion to continue, this time claiming that the State had failed to make "meaningful" disclosure and again waiving time under the inapplicable Rule 8. It should be noted that no order for additional disclosure was sought or made[3] and the State had, prior to this point, disclosed all material in the undersigned's possession when the undersigned charged this

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[1] The State requests that the Court take judicial notice of its file pursuant to Arizona Rules of Evidence Rule 201 for references to pleadings and orders in the Court's file.

[2] Had counsel for the defendant read Rule 8 at any time after December 21, 2002, he would know that Rule 8 has no pre-arraignment application. This was just the first clue the State had that counsel for defendant was not especially up-to-date when it comes to reading rules and statutes and cases interpreting them. As will become clear, for an attorney "qualified" to handle capital cases, counsel for the defendant is not well-versed in the law.

[3] ARIZ. R. CRIM. P. 15.1(g).

case. Pursuant to Rule 15.1(a),[4] the State is only required to disclose "***then existing*** original and supplemental police reports prepared by a law enforcement agency in connection with the particular crime with which the defendant is charged"[5] and "the names and addresses of experts who have personally examined a defendant or any evidence in the particular case, together with the results of physical examinations or comparisons ***that have been completed***"[6] "***that were in the possession of the attorney filing the charge at the time of filing***"[7] "***at the preliminary hearing.***"[8] Nevertheless, the State continued to disclose information as it came into the State's possession *prior to* the preliminary hearings in this case.

On December 17, 2009, counsel for defendant filed his fourth motion to continue, again on the eve of the preliminary hearing. This time, counsel for the defendant claimed that his lap top computer had become corrupted and he could not get the technical support he needed to prepare for the preliminary hearing prior to the December 18 hearing. One is left to wonder what preparation could have been conducted in the, at most, 29 and one-half hours before the hearing in this first degree murder case that had not been done in the 78 days during which counsel for the defendant had been assigned the case. In any event, counsel for the defendant then supplemented his motion with an avowal that he required the lap top computer in order to proceed with the preliminary hearing and that he could provide the magistrate with proof of the repairs "if so required to do so by the court" (sic). Inasmuch as counsel for the defendant's motion and response to the magistrate's inquiry appear to have been prepared using a computer and printer, rather than the expected paper circle and crayon, counsel for the defendant must

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[4] Something counsel for defendant would have been aware of had he read the rule at any time after December 1, 2003.
[5] ARIZ. R. CRIM. P. 15.1(b)(3), *emphasis added.*
[6] ARIZ. R. CRIM. P. 15.1(b)(4) , *emphasis added.*
[7] ARIZ. R. CRIM. P. 15.1(a) , *emphasis added.*
[8] *Id., emphasis added.*

have had access to some form of computer which, given that he did not, on any occasion, bring his lap top computer into court, invites further inquiry into why he could not have prepared in the 78 days during which counsel for the defendant had been assigned the case using whatever computer was used to prepare the motion to continue and response to the magistrate on December 17, 2009. The preliminary hearing was reset for February 5, 2010, 132 days after the defendant's arrest and 128 days after counsel for the defendant's appointment.

On February 5, 2010, the preliminary hearing, in fits and starts, began. Prior to the conduct of the hearing, the undersigned made a record of the plea offer and its rejection to prevent a later finding of ineffective assistance of counsel under *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000).[9] Counsel for defendant vehemently objected to the undersigned's efforts to make a record concerning the plea offer claiming that he had never heard of *Donald*.[10] Following close on the heels of this bizarre showing of abject ignorance, counsel for defendant then objected to admission of hearsay statements from co-defendant William Inmon claiming that Inmon had, only ten days earlier on January 26, 2010, been removed from the jail on a stretcher and might well be in such dire medical straits as to be unavailable at trial.[11] Then, following a trip down the irrelevant lane of the specifics of an "interview,"[12] the contents of

[9] R.T. Preliminary Hearing 2/5/10 p. 4 at l. 11 through p. 5 at l. 20

[10] R.T. Preliminary Hearing 2/5/10 p. 6 at l. 1 through p. 7 at l. 18. For a criminal defense attorney to claim to have never heard of *Donald*, ten years later seems absurd. Either counsel for defendant was being disingenuous in an effort to curry favor to his position from the magistrate or he is woefully uninformed and unprepared to conduct a homicide defense in 2010. A cursory search of Westlaw reveals six opinions and 43memoranda, including one depublished opinion, that refer to *Donald*'s core holding, i.e., a "defendant has a Sixth Amendment right to be adequately informed of the consequences before deciding whether to accept or reject" a plea offer, *Donald* at 413 ¶ 14, 10 P.3d at 1200 and the case has spawned the now ubiquitous term: "*Donald* hearing." A practicing criminal defense attorney in 2010 who is unaware of *Donald* is *rara avis*, indeed, and for such a practitioner to be considered competent to handle a first degree murder defense seems bizarre.

[11] R.T. Preliminary Hearing 2/5/10 p. 18 at l. 21 through p. 19 at l. 13 and p. 20 at ll. 20-22. Even assuming that this patently false statement was made out of ignorance or the misplaced reliance on the reporting of his client, ample time elapsed between February 5, 2010 and the continuance of the preliminary hearing on March 19, 2010 to investigate the validity of this statement and correct it as required by ER 3.3.

[12] R.T. Preliminary Hearing 2/5/10 p. 35 at l. 16 through p. 49 at l. 24. As established *infra*, describing this conversation as an interview or interrogation stretches the meaning of those words beyond credibility.

which the State had not sought to use as evidence in the case, counsel for the defendant then requested a fifth continuance to permit him to file a motion to dismiss for prosecutorial misconduct, an issue over which the Justice Court lacked jurisdiction to consider,[13] a fact any reasonable practitioner of criminal law purportedly qualified to defend capital cases should know.[14] Counsel for defendant's oral motion to continue was granted and the preliminary hearing was reset for March 5, 2010, 160 days after the defendant's arrest and 156 days after counsel for defendant was appointed.

On February 11, 2010, counsel for defendant filed his sixth motion to continue the preliminary hearing citing, cursorily, his attendance at a graduation of an immediate family member. The State objected to the motion to continue. The magistrate denied the motion to continue. Counsel for defendant then filed multiple motions including a conditional motion to withdraw supported by his assertion that his personal issues would interfere with his ability to defendant his client if he were not to get his way and clarifying the nature of the degree and degree of consanguinity with the graduate referred to in his motion to continue. Upon reconsideration, the magistrate granted the motion to continue and reset the preliminary hearing for March 19, 2010, 174 days after the defendant's arrest and 170 days after counsel for defendant was appointed.

Counsel for defendant then filed an emergency motion to continue, citing a death in the family, on March 17, 2010 and withdrew the same on March 18, 2010. Why this motion, filed two days in advance of the hearing was entitled "emergency" while the two motions requesting a

[13] ARIZ. CONST. ART. 6 § 32(C)("Criminal jurisdiction [of justice of the peace courts] shall be limited to misdemeanors."); Ariz. Rev. Stat. § 22-301(A)(2)("The justice of the peace courts shall have jurisdiction of ... [f]elonies, but only for the purpose of commencing action and conducting proceedings through preliminary examinations and holding the defendant to answer to the superior court or to discharge the defendant if it appears that there is not probable cause to believe the defendant is guilty of an offense.").

[14] ARIZ. REV. STAT. § 22-301(A)(2) has existed in some form since 1913 and Article 6, section 32(C) of the state constitution has existed at least since December 9, 1960.

continuance on the eve of the hearing bore no such moniker remains an unsolved mystery.

On March 19, 2010, following nearly six months of incarceration, which time is excluded both from Rule 8 and Sixth Amendment speedy trial[15] calculations, the preliminary hearing was, at long last, held. Following the State's presentation of evidence, the magistrate found probable cause to bind the defendant over for trial and further found that the defendant's offer of proof was insufficient to overcome this finding. The State filed an Information with this Court on March 24, 2010 and, at long last, the Court arraigned the defendant on March 29, 2010. One day prior to the end of his sixth month in jail, the defendant finally gained the right to a speedy trial under the Sixth Amendment to the United States Constitution. Five days later, his Rule 8 right to a speedy trial attached.

Given the delay in this case created at the behest, not directly of the incarcerated defendant and not directly for the incarcerated defendant's benefit, of counsel for the defendant, to say that this case involved any kind of rush to get to the Superior Court where, to the real and tangible benefit of the defendant, defense counsel's specious motions – like the one at bar – can finally be ruled upon is stretching credibility to near its breaking point. But the lack of credibility does not stop with this inane assertion by defense counsel.

[15] *See State v. Medina*, 190 Ariz. 418, 420, 949 P.2d 507, 509 (App. 1997)(Sixth Amendment right to speedy trial attaches upon filing of information or indictment.

The Charges of First Degree Murder, Theft of a Means of Transportation and Conspiracy in the Complaint and Information are Legally Sufficient

First Degree Murder

Counsel for the defendant posits the unbelievably absurd, given the relative antiquity of the case law on the matter, claim that charging first degree murder in the alternative constitutes duplicitous charging. While it may be marginally understandable that defense counsel has failed to acquaint himself with such modern legal developments and 2000's *State v. Donald*, the 2002 amendments to Rule 8 and the 2003 amendments to Rule 15.1, it is far less understandable how defense counsel, purportedly qualified to represent defendants in capital cases, could suggest to this Court that alternative charging of crimes under A.R.S. § 13-1105 – the very offense that defense counsel is allegedly expert enough to handle when his client is facing a lethal injection – is duplicitous. The Arizona Supreme Court first suggested that first degree murder is a unitary offense, i.e., not subject to duplicitous charging analysis, on May 10, 1982.[16] The Arizona Supreme Court then boldly declared, without the "even had we found a duplicitous indictment," language that made *Axley*'s language subject to an *obiter dicta* argument, that "in Arizona, first degree murder is only one crime whether it is premeditated or a felony murder."[17]

These are not recent decisions, though recent decisions exist that reiterate the same holding,[18] but rather this has been the law since 1982. Given that defense counsel was admitted to practice law in 1984, it would seem that this would have been during a time when defense counsel still cared about keeping up with the law or, at the least, that defense counsel would have

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[16] *State v. Axley,* 132 Ariz. 383, 392, 646 P.2d 268, 277 (1982)(finding an indictment alleging alternative theories of first degree murder not to be duplicitous but going on to find no error even if such a charge were duplicitous).
[17] *State v. Gerlaugh,* 134 Ariz. 164, 168, 654 P.2d 800, 804 (1982) *citing Axley, supra,* and *State v. Encinas*, 132 Ariz. 493, 647 P.2d 624 (1982).
[18] *See State v. Tucker,* 205 Ariz. 157, 167, ¶ 50, 68 P.3d 110, 120 (2003)("That felony murder and premeditated murder contain different elements does not make them different crimes, rather they are simply two forms of first degree murder."); *see also Evanchyk v. Stewart*, 202 Ariz. 476, 47 P.3d 1114 (2002); *State v. Canion*, 199 Ariz. 227, 16 P.3d 788 (2000).

come across this then-relatively-recent holding in a bar review at some point or, if not by that means, at some point in the death penalty cases he previously defended which, allegedly, qualify him to defend such cases now. For defense counsel to make such an obviously frivolous claim before this case calls into serious question either his ability to defend this case effectively, his level of respect for the Court's cognitive abilities, or his ability to candidly address the Court.

Charging first degree murder in the alternative does not constitute duplicitous charging. To the contrary, failure to charge alternative theories of first degree murder in a single count will result in the case being remanded for re-sentencing even when the sentences on each theory of first degree murder is ordered served concurrently.[19]

Theft of a Means of Transportation

Once again, counsel for the defendant misses an age-old precedent which explains, as was the case with felony murder, why the state did not cite to a subsection of A.R.S. § 13-1814(A) in defining the defendant's theft of Daniel Achten's means of transportation, although more justifiably in this instance considering that the law is not so clearly spelled out and that application of logic is required. Just as theft as defined by A.R.S. § 13-1802(A) is a unitary offense,[20] theft of a means of transportation as defined by A.R.S. § 13-1814(A), a statute that was obviously created from A.R.S. § 13-1802(A), is a unitary offense. Thus, even had the State selected a subsection of A.R.S. § 13-1814(A), if some other theory of theft were to become supported by evidence adduced at any court hearing, the State could argue a different subsection of A.R.S. § 13-1814(A) because the charging document would be deemed amended to conform

[19] While A.R.S. § 13-116 permits charging a single act or omission under different sections provided that sentences are served concurrently, nothing in A.R.S. § 13-116 permits such charging where the same section is employed more than once for a singe act or omission. *See also State v. Brown*, 217 Ariz. 617, 177 P.3d 878 (App. 2008)(A.R.S. § 13-3407(A)(7) defines a unitary offense, i.e., transferring and selling a narcotic drugs which involve the same conduct are a singular charge and double jeopardy is violated by charging both acts in separate counts).

[20] *State v.* Dixon, 127 Ariz. 554, 561, 622 P.2d 501, 508 (App.1980)

to the evidence under Arizona Rule of Criminal Procedure 13.5.[21]

Conspiracy

Once again, counsel for the defendant appears incapable of reading comprehension. Either that or he is just averse to reading. "A person who conspires to commit a number of offenses is guilty of ***only one conspiracy*** if the multiple offenses are ***the object of the same*** agreement or ***relationship*** and the degree of the conspiracy shall be determined by the most serious offense conspired to."[22] The defendant's conduct, all done in concert with William Inmon, stems from the relationship created when the defendant agreed to aid William Inmon in exacting revenge on William McCarraghe and robbing and burglarizing McCarraghe's residence. Thus, based on the express language of A.R.S. § 13-1003(C), the State is required to include all offenses for which there is probable cause to believe that the defendant acted in concert with William Inmon to commit in a single count. Any other charging method would result in a violation of double jeopardy and an impermissibly multiplicitous charging instrument.[23]

[21] *State v. Winter*, 146 Ariz. 461, 706 P.2d 1228 (App. 1985)(Where State charged theft without selecting a subsection and the trial court instructed on the (A)(1) and (A)(5) theories supported by evidence, the charging document was nevertheless sufficient because theft is a unitary offense). While *Winter* was abrogated on other grounds, to wit: the determination that joyriding is, contrary to the holding in *Winter*, a lesser included offense of theft, it remains valid for the point asserted by the State.

[22] ARIZ. REV. STAT. § 13-1003(C).

[23] *See Brown, supra*, at 620, 177 P.3d at 881 (indictment charging multiple offenses under the same section for the same conduct unlawfully multiplicitous because indictment raised the possibility of double punishment, the multiplicitous charges are illegal) *but cf* Ariz. Rev. Stat. § 13-116 which permits multiplicitous charging where more than one section is charged by mandating concurrent sentencing.

Evidence was Presented to Support the Finding of Probable Cause for Each Charge in the Information

Generally

Probable cause exists when reasonably trustworthy information and circumstances would lead a person of reasonable caution to believe an offense has been committed by the accused. *State v. Spears*, 184 Ariz. 277, 908 P.2d 1062 (1996). The facts and circumstances present are to be construed in accordance with "the factual and practical considerations of everyday life on which reasonable and prudent men [and women], not legal technicians, act."[24] The United States Supreme Court has noted that:

> probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would "warrant a [person] of reasonable caution in the belief" that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required. Moreover, our observation in *United States v. Cortez,* regarding "particularized suspicion," is equally applicable to the probable cause requirement:
>
> "The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same-and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."[25]

Probable cause requires proof that creates "more than a mere suspicion, but less than prima facie[26] proof."[27] Evidence creating probable cause need not create a presumption that withstands all but contradictory evidence, but rather probable cause exists if, in light of all the facts and circumstances, "there is a fair probability" that the crime was committed and that the defendant

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[24] *Brinegar v. United States*, 338 U.S. 160, 175 (1949).
[25] *Texas v. Brown*, 460 U.S. 730, 742 (1983)(internal citations omitted).
[26] Evidence sufficient to establish a given fact in the absence of rebuttal or contradictory evidence. BLACK'S LAW DICTIONARY ABRIDGED SIXTH ED. (1991).
[27] *In re 1986 Chevrolet Corvette,* 183 Ariz. 637, 640, 905 P.2d 1372, 1375 (1994).

committed the crime.[28]

Premeditated Murder

Defendant claims a lack of probable cause for the offense of premeditated murder. Probable cause exists if the evidence supports a reasonable inference that the defendant committed premeditated murder either as a principle or as an accomplice.[29] Although not required to, the State did place the defendant on notice that the State intended to argue accomplice liability.[30]

In the instant case, the defendant admitted to Sergeant John Scruggs that the defendant "had been at [the defendant's] residence in St. Johns, Arizona, with William Inmon, and William Inmon had wanted to seek revenge on William McCarraghe, and that [the defendant] agreed to go with William Inmon to the McCarraghe residence and provide backup cover fire for him."[31] When asked to describe how he and Inmon got to McCarraghe's residence, "[the defendant] said that William Inmon had telephoned an acquaintance of both of theirs, a man named James Dandridge, who later arrived in a blue Chevrolet van, and they drove out to William Inmon's residence and obtained three firearms to be used in the crime and then they drove to McCarraghe's residence."[32] The defendant admitted to Sergeant Scruggs that he was in possession of a firearm at the McCarraghe residence when McCarraghe was shot[33] and to Sergeant Spivey that he had been there at the scene of the McCarraghe homicide, that had

[28] *Illinois v. Gates*, 462 U.S. 213, 238 (1983).
[29] An accomplice is "a person, other than a peace officer acting in his official capacity within the scope of his authority and in the line of duty, who with the intent to promote or facilitate the commission of an offense: solicits or commands another person to commit the offense; or aids, counsels, agrees to aid or attempts to aid another person in planning or committing an offense or provides means or opportunity to another person to commit the offense. ARIZ. REV. STAT. § 13-301. An accomplice is liable for the conduct of another who commits a crime and for any other crime which is a natural and probable or reasonably foreseeable consequence of the commission of such crime. ARIZ. REV. STAT. § 13-303(3).
[30] *State v. McInelly,* 146 Ariz. 161, 162-63, 704 P.2d 291, 292-93 (App.1985)("no requirement [exists] that the indictment charge [a defendant] as an accomplice in order to permit a jury instruction to that effect.).
[31] R.T. Preliminary Hearing 3/19/10 p. 33 at ll. 12-17
[32] R.T. Preliminary Hearing 3/19/10 p. 33 at l. 22 through p. 34 at l. 2
[33] R.T. Preliminary Hearing 3/19/10 p. 39 at ll. 11-15

participated in the death of William McCarraghe and that he had shot a firearm in the direction of McCarraghe, who was lying in bed.[34]

These admissions, standing alone,[35] are facts which would justify a reasonably prudent person in believing[36] that the defendant intended to aid Inmon in exacting revenge on William McCarraghe in a fashion involving the need for "backup cover fire" and involving the use of three firearms. These facts combine to create the inference that the natural and probable or reasonably foreseeable consequences of this vengeance would be the killing of William McCarraghe.[37] Further, these facts suggest the reasonable inference that, given the passage of time between William Inmon's statement that he wanted the defendant's assistance in gaining revenge on William McCarraghe, the drive to Inmon's residence from the defendant's residence to get the firearms, and the drive to McCarraghe's residence certainly gave Inmon time to reflect on his intent to kill McCarraghe, a fact from which a reasonably prudent person could clearly infer that such reflection had, in fact taken place. The defendant's confession revealed that he had intentionally gone with William Inmon to provide backup fire while William Inmon exacted revenge on William McCarraghe. This combined with the defendant's confession that ample time elapsed between his agreement to go with Inmon, the collection of the firearms and the killing, along with his confession that he fired, albeit with his eyes closed, in Inmon's direction, creates probable cause to believe that the defendant is an accomplice to the premeditated murder of William McCarraghe.

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[34] R.T. Preliminary Hearing 3/19/10 p. 15 at ll. 14-18

[35] While corroborating evidence was offered, no corroboration is necessary for a confession to form the basis of a finding of probable cause at a preliminary hearing. *State v. Jones (Roche)*, 198 Ariz. 18, 22 ¶ 16, 6 P.3d 323, 327 (App. 2000)(*corpus delicti* rule inapplicable at preliminary hearing).

[36] Probable cause exists if the facts and circumstances adduced are sufficient to justify the belief of a reasonable and prudent person that a crime has been committed by the defendant. See State *v. Miller*, 112 Ariz. 95, 97, 537 P.2d 965, 967 (1975); State v. Edwards, 111 Ariz. 357, 360, 529 P.2d 1174, 1177 (1974).

[37] An accomplice is liable for the conduct of another who commits a crime and for any other crime which is a natural and probable or reasonably foreseeable consequence of the commission of such crime. ARIZ. REV. STAT. § 13-303(3).

Whether the defendant wanted McCarraghe dead or actually shot McCarraghe or wanted to do anything more than ransack and burglarize McCarraghe's residence after McCarraghe was dead is of no moment. Because Inmon committed the premeditated murder, a natural and probable or reasonably foreseeable consequence of the revenge rifles imply, of McCarraghe, the defendant's crime, as an accomplice, was complete the moment that he offered to aid Inmon in Inmon's crime. It was doubly completed when the defendant provided Inmon the means or opportunity to commit the crime by aiding Inmon in carrying firearms to McCarraghe's residence. It was triply complete when, with or without his eyes closed, the defendant fired blindly into a residence where McCarraghe lay helpless in bed.

Additionally, William Inmon told Investigator Brian Hounshell that "[Inmon] had visited with a friend of his named Joe Roberts, and explained his displeasure with Mr. McCarraghe, that [McCarraghe] had inappropriately touched a few people here in town, and [Inmon] was very upset about it. And [Inmon] discussed it with Mr. Roberts. And [Inmon] advised Mr. Roberts that [Inmon] was going to kill Mr. McCarraghe. And [Inmon and Roberts] met and put a plan together, and [Inmon and Roberts] went out to Mr. McCarraghe's residence late in the evening and approached it. Both of them [Inmon and Roberts] were armed."[38] "Mr. Inmon, cut the screen so he could open a window in the living quarters where Mr. McCarraghe was sleeping; that [Inmon] called Mr. Roberts over to that location; proceeded to open the window. They both, Mr. Roberts and Mr. Inmon, had .22 caliber semiautomatic rifles. [Inmon] kicked the side of the residence, with the intentions of startling Mr. McCarraghe. Mr. Inmon yelled something to the effect of "Kill him now". They both fired approximately, combined, fifteen to sixteen rounds, striking Mr. McCarraghe."[39] These statements not only solidify the magistrate's finding of

[38] R.T. Preliminary Hearing 2/5/10 p. 21 at l. 24 through p. 22 at l. 8.
[39] R.T. Preliminary Hearing 2/5/10 p. 22 at l. 20 through p. 23 at l. 5

probable cause under an accomplice liability theory, but support such a finding under the theory that the defendant was a principal to the crime.

Felony Murder

The defendant told Sergeant John Scruggs that "after – according to what Joseph Roberts told me, after William McCarraghe had been shot by William Inmon, Inmon crawled through the window and then let Joseph Roberts in through the front door and then they ransacked or looked around the belongings in the room for property and they stole some items from inside there.[40] This confession, when combined with the foregoing statements that the defendant and Inmon arrived at the McCarraghe residence armed, then, after one or both of them killed McCarraghe, and after entering into the residence of and remaining in the residence of, the now conveniently deceased, McCarraghe unlawfully, one or both of them manifested an intent to commit a theft therein by committing a theft therein. It also establishes that lethal force was used in order to gain access to McCarraghe's property in McCarraghe's (admittedly now dead) presence.

Inasmuch as the defendant is, again, charged as both a principal and an accomplice to felony murder, his intent (beyond aiding, offering to aid, attempting to aid or providing means or opportunity to Inmon intending that Inmon engage in armed burglary and/or armed robbery) is immaterial. What is material is whether he aided, offered to aid, attempted to aid or provided means or opportunity to William Inmon to commit an armed burglary and/or armed burglary of William McCarraghe's residence and, if so, whether he or Inmon or both of them killed McCarraghe in furtherance of that crime.[41]

The proof, here, is in the pudding. The defendant and Inmon committed an armed

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[40] R.T. Preliminary Hearing 3/19/10 p. 40 at ll. 12-18

[41] *State v. Rios,* 217 Ariz. 249, 172 P.3d 844 (App. 2007)(To obtain conviction for felony murder on the theory of accomplice liability, the state need only prove that the defendant, either as a principal or as an accomplice, committed or attempted to commit predicate offense and that someone was killed in the course of and in furtherance of the robbery).

burglary of McCarraghe's residence, with the defendant as a principal or, at the very least, an accomplice. This armed burglary was made easier by the absence of resistance caused by McCarraghe's killing.[42] Likewise, an armed robbery was committed. The property taken was in McCarraghe's presence and McCarraghe was killed resulting in his resistance being made nonexistent. Inmon's request for assistance in gaining revenge on McCarraghe can as readily, even in light of the need for backup fire and three firearms, imply that Inmon intended to steal from McCarraghe, as he, in fact did, and that McCarraghe's murder, while still premeditated, was the side effect of this intent to commit an armed burglary.

Likewise, the defendant having, at the least, been an accomplice to the use of lethal force against McCarraghe, and that use of force having facilitated the theft of McCarraghe's property from McCarraghe's presence, the defendant was a principal or an accomplice to armed robbery. Defense counsel's suggestion that no force was threatened or employed to facilitate the theft, in light of the use of lethal force against McCarraghe leading to the theft of property from his presence is not only inane, but is patently offensive.

Conspiracy

As set forth, *supra*, probable cause exists to believe that the defendant was an accomplice to premeditated murder based on inferences from the defendant's knowledge that Inmon sought revenge against McCarraghe, that such revenge required "backup fire" and would involve the use of three firearms. Likewise, the defendant's agreement to engage in conduct intended to aid or provide means or opportunity for Inmon to commit premeditated murder constitutes an

[42] The proposition presented by counsel for the defendant that the murder must occur contemporaneously with the entry or thereafter in order to further the armed burglary is ludicrous beyond belief which is probably why, in addition to an aversion to research in general, there is no authority provided in support of this specious argument. Arguing that felony murder applies only where the armed burglars enter before killing rather than killing to facilitate entry is as bizarre and unmeritorious as arguing that charging first degree murder in the alternative is duplicitous in the face of 28 years of precedent to the contrary.

agreement between Inmon and the defendant (and probably James Dandridge) that one of them would engage in conduct constituting first degree murder.[43] The requirement of an overt act, though met when McCarraghe was actually murdered, is unnecessary here because the crime for which probable cause exists to support a conspiracy to commit involved a rather personal felony upon the person of William McCarraghe.

Likewise, the same facts which support probable cause for felony murder when combined with the defendant's offer to provide backup fire establishes a conspiracy to commit felony murder and to commit all of the lesser-included offenses contained therein, including armed burglary, armed robbery and theft.

As to the remaining cited subsections, the following arguments will establish the conspiracy, based on the relationship forged between the defendant and William Inmon beginning with the defendant's agreement to provide backup fire during Inmon's effort to gain revenge against McCarraghe, for the remaining offenses set forth by reference in the single count of conspiracy required by law.

Theft of a Means of Transportation

Inmon told Hounshell that Roberts had ended up having possession of Daniel Achten's Corvette.[44] Further, Inmon told Hounshell that Inmon and Roberts had used Achten's Corvette to tie a rope or strap to in order to drag Achten's corpse to a hole behind Achten's house.[45] Sergeant Spivey testified that Roberts had been stopped in a white Corvette registered to Daniel Achten in Springerville sometime before August 2009.[46] Spivey also testified that Roberts

[43] Ariz. Rev. Stat. § 13-1003(A).
[44] R.T. Preliminary Hearing 2/5/10 p. 29 at ll. 23-4
[45] R.T. Preliminary Hearing 2/5/10 p. 28 at l. 9 through p. 29 at l. 5
[46] R.T. Preliminary Hearing 3/19/10 p. 13 at ll. 22-25

admitted to having obtained the Corvette from Inmon[47] and that he was driving the car.[48] Sergeant Scruggs testified that Roberts told him that, after Daniel Achten was murdered, Roberts and Inmon attached a tow strap to a Corvette and Daniel Achten's corpse and drug Achten's body from Achten's residence.[49]

The essence of the crime of theft is the unauthorized control of another's property with the intent to deprive.[50] Here, there is uncontraverted testimony that the vehicle belonged to Daniel Achten, not the defendant, that the defendant had not operated the vehicle at the time that Daniel Achten's body was moved from his house to a hole in the ground and that the defendant had been stopped in Springerville driving the Corvette sometime in August 2009 during the investigation into Daniel Achten's disappearance. A reasonable person confronted with these facts could infer that the defendant knowingly and without lawful authority[51] controlled Daniel Achten's Corvette with the intent to permanently deprive and knowing or having reason to know that Daniel Achten's Corvette was stolen.

Mutilating a Body

Counsel for defendant is correct that Arizona Revised Statutes do not define "mutilate." In looking to dictionary definitions, common definitions of the word "mutilate" include: "to … make imperfect by … irreparably damaging parts,"[52] "to disfigure by damaging irreparably"[53] and "to make imperfect by … altering parts."[54]

The defendant told Sergeant Scruggs that the defendant aided Inmon in tying Daniel

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[47] R.T. Preliminary Hearing 3/19/10 p. 17 at ll. 22-23
[48] R.T. Preliminary Hearing 3/19/10 p. 18 at ll. 6-8
[49] R.T. Preliminary Hearing 3/19/10 p. 32 at ll. 11-15
[50] *Winter* at 464, 706 P.2d at 1231
[51] Daniel Achten being dead, could not have given such authority.
[52] MUTILATE. Dictionary.com. *Dictionary.com Unabridged.* Random House, Inc. http://dictionary.reference.com/browse/MUTILATE (accessed: April 20, 2010).
[53] MUTILATE. Dictionary.com. *The American Heritage® Dictionary of the English Language, Fourth Edition.* Houghton Mifflin Company, 2004. http://dictionary.reference.com/browse/MUTILATE (accessed: April 20, 2010).
[54] *Id.*

Achten's body to a Corvette, that Inmon used the Corvette to drag Achten's corpse to a hole where he and Inmon then set the body on fire.[55] Additionally, Inmon told Hounshell that he had asked for Roberts' and Roberts' wife's help in disposing of Daniel Achten's body because Achten was too heavy for Inmon to handle alone.[56] Inmon said that Roberts assisted Inmon in digging a hole, putting Achten's body in that hole, placing wood in the hole with Achten's body and remained by Achten's body for several hours while it burned before ultimately burying Achten's body.[57]

Burning a dead human body for several hours clearly creates probable cause to believe that, as a principal, as an accomplice and as a conspirator, the defendant made Daniel Achten's body imperfect by irreparably damaging it with fire. There is probable cause for the offense of mutilating a body.

Concealment of a Dead Body

The facts in support of probable cause to believe the defendant committed the offense of concealing a dead body are the same as those for mutilating a body. A reasonable person faced with facts that Roberts aided Inmon in moving Achten's body from Achten's trailer to a hole that Roberts aided Inmon in digging, then burned Achten's body for several hours and then buried Achten's body would be justified in finding probable cause for this count.

Tampering with Physical Evidence

Likewise, the facts in support of probable cause to believe that the defendant committed the offenses of mutilating a body and concealing a dead body support probable cause to believe that he, as an accomplice, as a principal and as a conspirator, tampered with evidence, to wit: Daniel Achten's body, that he knew would ultimately be commenced upon the discovery of

[55] R.T. Preliminary Hearing 3/19/10 p. 32 at ll. 6-22 and p. 35 at ll. 21-23
[56] R.T. Preliminary Hearing 2/5/10 p. 28 at ll. 9-24
[57] R.T. Preliminary Hearing 2/5/10 p. 29 at ll. 2-16

Achten's body.

Hindering Prosecution

From Sergeant Scruggs' statement that "it took a while before he admitted his involvement in the crimes,"[58] a reasonable inference may be drawn that the defendant initially denied involvement in the crimes under investigation, to wit: the murder, concealment and mutilation of Daniel Achten and the murder and theft from William McCarraghe. Further, Sergeant Spivey stated that Roberts had denied involvement in the McCarraghe murder when Spivey interviewed Roberts in 2007.[59] Nevertheless, the defendant ultimately admitted, as set forth above, facts which could cause a person of reasonable caution to infer that he knew of William Inmon's and James Dandridge's involvement in the murder of William McCarraghe and in the robbery or burglary of McCarraghe's residence. Further, the defendant ultimately admitted, as set forth above, facts which could cause a person of reasonable caution to infer that the knew of William Inmon's involvement in the murder of Daniel Achten. Thus, by denying knowledge of these events, the defendant concealed the identities of William Inmon and James Dandridge in conjunction with those offense.

[58] R.T. Preliminary Hearing 3/19/10 p. 33 at ll. 3-8
[59] R.T. Preliminary Hearing 3/19/10 p. 11 at l. 13 through p. 12 at l. 15

The Magistrate Properly Concluded that She was without Jurisdiction to Consider the Defendant's Motion to Dismiss

A Justice of the Peace has only the jurisdiction provided her by the Constitution of the State of Arizona and such constitutional laws as made by the Arizona Legislature. A Justice of the Peace has no jurisdiction, in the broad sense, in felony cases.[60] The "jurisdiction" afforded to a Justice of the Peace serving as a magistrate in a felony case extends only to determining the existence or non-existence of probable cause.[61] The reason that "jurisdiction" over preliminary hearings is permissible for a Justice of the Peace sitting as a magistrate is that the "jurisdiction" over the felony case does not extend to "a final determination of the criminal action."[62] Here, the defendant sought to have the Justice of the Peace dismiss a prosecution with prejudice. Nothing could more constitute "a final determination of the criminal action" than a dismissal with prejudice.

Clearly the Justice of the Peace lacked jurisdiction over the charges in the complaint to the extent that she could order the case dismissed even if the defendant's motion had merit. The Justice of the Peace clearly recognized this in summarily declining to consider the defendant's motion because it was prematurely filed. The defendant did not have a right, let alone a substantial procedural right, to have the Justice of the Peace consider a motion over which she was powerless to grant relief.

The Defendant's Motion to Dismiss is without Merit

The defendant, relying heavily on *State v. Warner*,[63] suggests that the State interfered

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[60] ARIZ. CONST. ART. 6 § 32(C)("Criminal jurisdiction [of justice of the peace courts] shall be limited to misdemeanors.").
[61] ARIZ. Rev. Stat. § 22-301(A)(2)("The justice of the peace courts shall have jurisdiction of ... [f]elonies, but only for the purpose of commencing action and conducting proceedings through preliminary examinations and holding the defendant to answer to the superior court or to discharge the defendant if it appears that there is not probable cause to believe the defendant is guilty of an offense.").
[62] *State v. Dziggel*, 16 Ariz.App. 289, 291, 492 P.2d 1227, 1229 (1972).
[63] 150 Ariz. 123, 722 P.2d 291 (1986)

with the defendant's right to counsel such that the charges against him should be dismissed with prejudice. This reliance, for a multitude of reasons, is misplaced.

First, the facts in *Warner* are not even remotely similar to the facts at bar. In *Warner*:

> Approximately 30 days before [Warner]'s trial, jail personnel conducted a "shakedown" search of [Warner]'s cell and seized all the papers located therein. Apparently various jail inmates told authorities that [Warner] and Merwin[64] had discussed altering their testimony for trial. The search was apparently conducted to secure evidence of this alleged perjury. All of the papers were copied, the originals returned to [Warner] while copies were given to the County Attorney.
>
> The bulk of the seized documents were letters either written by [Warner] or Merwin to various people. There were also letters written to [Warner] that he received in jail. Also seized were transcripts and summaries of jail conferences with defense counsel. [Warner]'s attorney had a practice of tape-recording his consultations with [Warner], having summary transcriptions made and then supplying [Warner] with a copy. [Warner] then made his own personal notes in relation to these conversations and other aspects of the case.
>
> The County Attorney had possession of these documents for approximately 30 days before notification was given to defense counsel who found out on Saturday. The trial began on Tuesday. On the first day of trial, before a jury was picked, [Warner] moved for dismissal based on the state's violation of the attorney-client privilege and an illegal search of [Warner]'s cell. The trial court refused to hear argument at that time and requested defense counsel to submit authority for his moving position. After the jury was selected the prosecutor gave the trial court a sealed file which contained the seized documents.
>
> The next morning the motion to dismiss was orally argued by the parties with neither side presenting written memoranda. [Warner] urged that the charges should be dismissed or in the alternative that the state should be precluded from using the material in any way. [Warner] claimed the state allegedly called two witnesses based upon the information and later claimed that he was forced to take the stand in his defense due to the seizure.
>
> The prosecutor admitted that his office had possession of the documents for approximately 30 days. He claimed to have given the package to an assistant to read, who later returned it to the prosecutor with the comment that "there may be some interesting things in there and that I should look at them." The prosecutor next claimed to have read a letter to [Warner] from his mother and then began reading transcripts or a memorandum from the defense attorney's office. He avowed to the trial court that he immediately stopped reading and that he did not obtain any information from the papers.[65]

In the instant case, following a discussion with the County Attorney and the undersigned

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[64] a co-defendant who had pled guilty to related charges and was to testify against Warner

[65] *Warner* at 293-4, 722 P2d at 125-6

concerning the state of the law concerning a post-arrest defendant who had not invoked his *Miranda*[66] or *Edwards*[67] right to counsel and post-arrest interviews, County Attorney Investigators Hounshell and Jaramillo engaged the defendant in the following colloquy:

BRIAN HOUNSHELL: Joe Roberts?

JOSEPH ROBERTS: Yeah.

BH: Hi, my name is Brian Hounshell. I'm an investigator with the Apache County Attorney's Office.

JR: Uh hum.

BH: This is Jerry Jaramillo, he's my partner. He's an investigator as well.

JR: Uh hum.

BH: We need to cover a couple of things with ya and, I understand that you have court tomorrow. But before we talk to you, I'm going to read you your rights so you understand that you have rights. You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right to the presence of an attorney to assist you prior to questioning, to be with you during questioning if you so desire. If you can't afford an attorney, you have the right to have an attorney appointed prior to questioning. Do you understand your rights?

JR: Uh hum.

BH: Is that a yes?

JR: Yes sir.

BH: OK. We're not here to question you about the charges that are currently against you. I'm here to explain a couple of things about court. To start with, today is 2/4; February 4, 2010, and we are at the Apache County Jail, its uh, 11:10 hours. We are in the attorney client room. Just want to make sure that's on because we are recording this. Tomorrow you're scheduled for a Preliminary Hearing.

JR: Uh hum.

BH: On, on your case. Um, I've been working on this case since the very beginning. I don't know if you, if you know me or ever met me, I don't think I have. I've looked over most of the case. I definitely know Inmon and Johnson. Your Prelim is scheduled tomorrow. I just want to make sure that understand what's going to happen tomorrow.

[66] *Miranda v. Arizona,* 384 U.S. 436 (1966).
[67] *Edwards v. Arizona,* 451 U.S. 477 (1981).

JR: Uh huh.

BH: Um, you have an option to go to Preliminary Hearing. You have an option to waive it tomorrow. If we go to Preliminary Hearing tomorrow, it will be a tougher road for you. What I mean by that is, right now they've made some offers to you about doing 25 years, not getting a life sentence. This could be possibly handed down by a judge if you are convicted. That we are not going to seek a death penalty against you. There are benefits for you by not going to Preliminary Hearing. And the benefits will be discussed before your Preliminary Hearing starts if you choose to still go through and have one tomorrow. But I want you to understand that, that right now, they're willing to offer you 25 years. K? And like I said, I work mainly on Inmon's case. And uh, I was present when they interviewed you. The three times they talked to you, I watched the interviews, live, while they talked to you. Inmon will probably be sentenced to 25. So, you, by not entering into a deal or at least entertaining the thought of what they are offering you on the 25 years right now, potentially you could more time than Inmon. You could do a life sentence. A natural life sentence. You could possibly, they could possibly seek the death penalty. So those are things that you need to understand if you go forward, and I want you to understand that Preliminary Hearing is a probable cause hearing. Do you understand what that means?

JR: Uh huh.

BH: I will be there to testify on behalf of the State on what Inmon told me, what you said about Achten, and when the removal of the body from the motor home. You know, your wife being there. Inmon being there. You being there. The next interview with Scruggs where you were kind of involved, you know, where "he took my gun", blah, blah, blah, and you know, "he shot his gun". Then the final interview, I was working, if you remember back, on that interview, there is a lot of breaks in between on that interview at the jail, I mean at the Sheriff's Office earlier, when you wanted to talk to the detectives about, about uh, that Rabbi in Phoenix with. .

JR: Uh huh

BH: So, you remember breaking in that interview a lot, well, that was because I was working with them on that interview where you admitted to shooting the gun at Stoney. So, the evidence is there for the Preliminary Hearing, and it will pan out tomorrow one way or the other. Um, we feel very confident that we will bind you over with no problem. If you are interested in working any type of a deal before we go to Preliminary Hearing, you need to contact your attorney today so you can work it out with them. If not, it's your decision to move forward, but we're going to mention to the judge, on, on, on the record before the Preliminary Hearing that we offered you 25. And, and that's coming off the table. And we could seek natural life, or the death penalty. I just want you to know that, I want to be upfront with you, to make sure you understand that, that might happen, if we go through with the Preliminary Hearing. Now, on the other hand, if you still want to go forward, it's entirely up to you. As far as your wife, I understand she had a baby.

JR: Nuh uh.

BH: Or, didn't her baby, I, I, I have no idea what happened there. Did she have her baby?

JR: Nuh uh

BH: Cause, wasn't she pregnant?

JR: Uh huh.

BH: Did she miscarriage.

JR: Uh huh.

BH: I didn't know that. Are you still, are you legally married to her Joe?

JR: Yes I am.

BH: Are you guys still communicating, and everything?

JR: Yeah.

BH: K, well I, I'm . . . condolences. See I don't, that's what I'm saying, I don't know much about your case, I'm sorry you guys lost the baby. We haven't charged your wife yet. OK? Um, we've charged Mrs. Johnson, I don't know if you heard, she's in here, for hindering, for lying to us about, about the death of Ricky Flores. And, your wife was given the same opportunity to come forward when we picked you up that day, and she denied any involvement in, I mean, about Achten, she was there, by your admission and by Inmon's admission. So that's, that's another situation that you may be dealing with at a later date. It's just that we have had so many cases, and so much going on, and we just put Melissa Johnson back in a no bond. Her original charge was a hindering. So the investigation is still ongoing. But I want you to know if we go through Preliminary Hearing tomorrow, our deals are off the table. You could do more time than Willie Inmon. So, if you want to go through with it, that's your, that's your right. If you want to waive your attorney. . . waive the hearing, you need to get with your attorney today and let him know. You know, it's up to you, but I want you to understand what you're up against. We, if you, how old are you?

JR: 23

BH: 23, 33, 43, 47, 48 years old, you'd be out. That's the age me and Jerry are. So there'd be life to live after you did your sentence, if you choose to do that. You'll still be, in probably reasonably in good health, and live a life. But if you take the risk of a life sentence or lethal injection, if they decide to pursue the death penalty, which we have one death penalty case currently in motion in our office right now, that is something you'll have to deal with. So, you know we're not here promising you anything, we're not here trying to talk you either way, either way, because we're prepared to go to Preliminary Hearing to bind you over to Superior Court, tomorrow at 1:30 or 2:00, whenever it is. We have no problem doing that. But if you want to help yourself on a deal, then you might want to get a hold your attorney and discuss a few things. Like everybody that's been involved in these cases from Inmon to

Johnson to you and Melissa. I've set down and had the same talk with them, in a roundabout way. Some have listened, some haven't. Inmon decided to spare his life. And that's an option you have as well, if that goes through. So I just wanted you to think about what you're going to do. And make sure inaudible what you really want to do cause it's your life. And if you intend to go tomorrow, then that's fine, that's your right. If you don't, then get a hold of your attorney today. And then we will talk with your attorney and try and set up some type of deal to eliminate a natural life sentence being pursued or the death penalty. It's up to you.

JR: Uh huh.

BH: I don't have anything else. You have anything Jerry?

JERRY JARAMILLO: Do you have any questions, Joseph?

JR: No.

JJ: K.

BH: OK, it is approximately 11:18 hours, we are going to go ahead and end this interview. Thanks for your cooperation.

Thus, it is plain that the facts in the instant case and the facts in *Warner* could not be more different. Whereas the prosecutor in the *Warner* case actually had attorney-client communications in his possession, here such the contents of such communications were neither sought nor obtained. Additionally, there are not self-incriminatory statements that, if *Jackson*[68] were still good law, which it is not,[69] to be suppressed because admissions were neither sought nor obtained. Just as the absence of any tainted evidence being used by the prosecution did not require any remedy in *Warner*,[70] the absence of any evidence even being obtained in the instant case requires the same result.

Secondly, the law covering the two cases is markedly different. This case and *Warner* differ factually is that this case did not involve the collection of documentary evidence, but rather this case involved a conversation between investigators and a defendant. In *Warner*, the

[68] *Michigan v. Jackson,* 475 U.S. 625 (1986).
[69] *Montejo v. Louisiana,* --- U.S. ----, 129 S.Ct. 2079 (2009)(overturning *Michigan v. Jackson,* U.S. 625 (1986)).
[70] *State v. Warner,* 159 Ariz. 46, 764 P.2d 1105 (1988).

collection of the evidence was the result of a search, governed by the Fourth Amendment. In this case, the (non)-collection of evidence was the result of a custodial interrogation[71] following the giving of a *Miranda* warning and the explicit waiver by the defendant of his right to have counsel present during the conversation. Thus, while no consent to search *Warner*'s cell to collect evidence was present in the facts of *Warner*, a waiver of counsel was sought and obtained in the instant case.

Third, the State of the law concerning interviewing charged defendants with appointed counsel changed dramatically prior to the interview conducted with the defendant, who had not invoked his right to counsel under *Miranda* or *Edwards* and who had waived his right to have his attorney present as permitted by *Montejo*.[72] Between 1986 and 2009, once a defendant had a right to counsel attach and whose counsel had entered an appearance, no waiver of the right to have counsel present during any conversation between the State and the defendant could take place unless counsel was present.[73] Thus, under the provisions of *Montejo*, any evidence that was adduced during this conversation would be admissible.[74]

Finally, the defendant's allegation that the case should be dismissed for prosecutorial misconduct fails for two reasons.

First, "[t]o prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'"[75] There having been no trial, there cannot then have been prosecutorial misconduct. Likewise, there was no prosecutorial vindictiveness, a pretrial basis

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[71] As very liberally construed given that no testamentary statements were sought or collected.
[72] *Montejo* at ----, 129 S.Ct at 2091.
[73] *See Jackson, supra* at fn 41
[74] *Id.*
[75] *State v. Hughes,* 193 Ariz. 72, 79, 969 P.2d 1184, 1191 (1998) quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974).

for dismissal based on the actions of a prosecutor, because the defendant exercised no statutory or constitutional right for which the State punished him.[76]

Second, there is no authority the undersigned could find which holds that a case may dismissed where a prosecutor violates an ethical rule, especially where, as here, the rule was not intended to apply in the criminal context[77] and where technical violation of the rule does not rise to the level of a violation of a constitutional right of the defendant's.[78]

Third, there was no violation of ethical rules upon which a finding of prosecutorial misconduct supporting the draconian sanction of dismissal with prejudice can be made. In *Richmond*[79] the Arizona Supreme Court determined that the purpose of ER 4.2's predecessor rule was to afford civil litigants a measure or the constitutional protections enjoyed by criminal defendants by cases such as *Miranda.*[80] It follows, then, that ER 4.2 was never intended to expand or displace the constitutional protections given criminal defendants. This leads to the conclusion that, so long as the prosecutor acts within the scope of conduct prescribed by the Arizona and United States constitutions, there is no unethical conduct on the part of the prosecutor with respect to a criminal defendant and, even if there is, that conduct will not support suppression of evidence or dismissal. In the instant case, the undersigned and the County Attorney correctly advised Investigator Hounshell that investigators may speak to an inmate who

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[76] *United States v. Meyer,* 810 F.2d 1242, 1245 (D.C.Cir.1987)("Prosecutorial vindictiveness" occurs when the government retaliates against a defendant for exercising a constitutional or statutory right.").
[77] *State v. Richmond,* 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976) *abrogated* on other grounds by *State v. Salazar,* 173 Ariz. 399, 844 P.2d 566 (1992).
[78] *See State v. Skinner,* 110 Ariz. 135, 148-9, 515 P.2d 880, 893-4 (1973)("Defendant next contends that it was reversible error for the prosecutor to continually and repeatedly violate the trial judge's orders, the Code of Professional Responsibility, and the American Bar Association's Minimum Standards for Prosecutors. A party is entitled to a fair trial, not a perfect one. For the purpose of appeal of a criminal case, we will review misconduct on the part of a prosecutor to determine whether the defendant has been denied a fair trial. While the Code of Professional Responsibility and the Minimum Standards for Prosecutors are certainly helpful in determining whether or not the conduct complained of is acceptable, the question before us is whether the trial is fair. If the trial is fair, we will not reverse merely to punish the misdeeds of counsel.")
[79] *Id.*
[80] *Id.*

is represented by counsel provided that the defendant has not invoked his right to counsel under *Edwards* and that the defendant waives his right to counsel after a *Miranda* advisory.[81] It was certainly no ethical violation to have advised an investigator, accurately, of the state of the law.[82]

In summary, there was no constitutional violation that would require suppression of evidence, let alone dismissal of the charges. The allegations that the State engaged in bullying behavior to coerce the defendant into surrendering his right to a preliminary hearing is simply not borne out by the contents of the interview which sparks defense counsel's ire. And there simply is no prosecutorial misconduct upon which to support suppression of evidence or dismissal as a sanction because prosecutorial misconduct is determined at the close of trial by misconduct that permeates the trial and prejudices the defendant.

The Bar Complaint Filed by Counsel for Defendant did not Deprive the Magistrate of Her Statutory Duty to Determine the Presence or Absence of Probable Cause

The undersigned and the Apache County Attorney submit that they engaged in no unethical conduct, but even if the Court disagrees, there is no provision in the Arizona Revised Statutes, the Arizona Rules of Criminal Procedure or any reported case that the undersigned could find after a diligent search, that holds that the filing of a bar complaint against the prosecutor serves to stay a criminal prosecution or that invests jurisdiction in the Justice of the Peace Court to make rulings concerning a felony criminal case that go beyond a determination of the presence or absence of probable cause.[83] For this Court to entertain the notion that all that is required to permit a first degree murder case to stop in its tracks (to the detriment of the

[81] *See Montejo, supra.*

[82] The Court should also be mindful of the patently incorrect assertions of law contained in the motion filed by counsel for the defendant and the draconian remedy which would be imposed upon the State under the decision in *Donald, supra,* if the State had not made sure that the defendant was intelligently declining the State's offer and the defendant then went to trial at an enormous cost to the State only to receive the benefit of the pre-informational agreement.

[83] *But see Skinner, supra,* for the proposition that the ethical rules, while assistive perhaps, **do not** control the determination of whether a criminal proceeding is or is not fair or whether due process is or is not met.

defendant who remains in custody with no beginning – let alone and end – in sight) merely as a result of a bar complaint being filed at a stage when the magistrate lacks the authority to grant any substantive relief based on the alleged ethical violations, would do no more than invite every criminal defendant, especially those out of custody who don't suffer from the custody with no relief in sight that counsel for the defendant is imposing on his own client, in Apache County to file a bar complaint against the prosecutor in their case in order to stall the proceedings until the state bar can decide whether or not there is a basis to move forward. This would certainly be followed by a bar complaint against the new prosecutor in the event the original prosecutor was removed from the case or voluntarily resigned from the prosecution.

Even if this were not so, the defendant's presentation of the fact of the bar complaint on the day the preliminary hearing was set with little more than an implied motion to remove the County Attorney's office from the case, was woefully untimely. Surely, if counsel for the defendant had time to craft a bar complaint between February 5, 2010 and March 19, 2010,[84] he surely could have crafted at least a rudimentary motion to disqualify the County Attorney's office prior to March 19, 2010.

Ultimately, the presentation of evidence, taken as a whole, was fair and there is no indication whatsoever that the magistrate acted in any manner other than dispassionately and impartially toward the defendant. There was sufficient evidence to support probable cause for the charges in the Information and the defendant was, in no way, prejudiced by the magistrate's refusal to consider counsel for the defendant's untimely oral motion.[85]

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[84] Notice of the complaint was not mailed to the undersigned by the State Bar until March 30, 2010, so the undersigned had no knowledge at all that a complaint had been filed on March 19, 2010.

[85] For the reasons set forth above, the State further submits that the proposition that the Justice Court had jurisdiction over such a motion is, at best, dubious.

Conclusion

The charges in the complaint were, each and every one, sufficient as a matter of law. Not only were the charges not duplicitous, but to charge them as suggested by counsel for the defendant could lead to the charges being unlawfully multiplicitous. The charges in the Information are, each and every one, supported by facts presented to the magistrate, which could cause a person of ordinary caution, employing non-technical and commonsense logic, to reasonably infer that the defendant committed them. The magistrate lacked jurisdiction to consider the defendant's motion to dismiss and could not, therefore, have deprived him of any substantial procedural right by recognizing her lack of jurisdiction over the subject matter of the motion. The defendant's motion to dismiss was, in any event, without merit. Finally, the magistrate did not deprive the defendant of any substantial procedural right by declining to consider his inarticulate and untimely implied motion to either disqualify the Apache County Attorney's office from the case or delay the already six-month-delayed preliminary hearing until the State Bar could consider the merits, or lack thereof, of counsel for the defendant's complaint.

The defendant makes no colorable claim to the absence of probable cause or to the denial of any substantial procedural right. The State suggests, therefore, that the Court determine which, if any, issue presented by the defendant is deserving of further proceedings and either summarily deny the motion in its entirety or summarily deny those clearly meritless issues and notify the parties regarding which issues remain to promote judicial and fiscal economy.

RESPECTFULLY SUBMITTED this 6th day of May, 2010.

Michael B. Whiting
Apache County Attorney

Martin Brannan
Chief Deputy County Attorney

A copy of the foregoing
mailed/delivered this
6th day of May, 2010, to:

David J. Martin
Attorney for Joseph Douglas Roberts

Honorable Donna J. Grimsley
Judge of the Superior Court

By _____